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No. 88-951

In the Supreme Court of the United States

OCTOBER TERM, 1988

DOROTHY WILLNER,
Petitioner,

vs.

UNIVERSITY OF KANSAS, GENE BUDIG, ARCHIE R. DYKES, DELBERT M. SHANKEL, FRANCES D. HOROWITZ, ROBERT P. COBB, DEANELL TACHA, ROBERT L. LINEBERRY, ROBERT S. HOFFMAN, ROBERT J. SQUIER, ANTA MONTET-WHITE, ALFRED E. JOHNSON, MICHAEL CRAWFORD, JOHN M. JANZEN, F. ALLAN HANSON, FELIX MOOS, DAVID FRAYER, ROBERT J. SMITH, DONALD STULL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Were petitioner's motions for disqualification of the district court judge untimely?
2. Does the Tenth Circuit's affirmance of the district court's denial of disqualification motions conflict with decisions of this Court or other circuits?
3. Can petitioner's willful failure to comply with court orders for more than six months be excused by her choosing to not work on three holy days?

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No. 88-951

In the Supreme Court of the United States

OCTOBER TERM, 1988

DOROTHY WILLNER,
Petitioner,

vs.

UNIVERSITY OF KANSAS, GENE BUDIG, ARCHIE R. DYKES, DELBERT M. SHANKEL, FRANCES D. HOROWITZ, ROBERT P. COBB, DEANELL TACHA, ROBERT L. LINEBERRY, ROBERT S. HOFFMAN, ROBERT J. SQUIER, ANTA MONTET-WHITE, ALFRED E. JOHNSON, MICHAEL CRAWFORD, JOHN M. JANZEN, F. ALLAN HANSON, FELIX MOOS, DAVID FRAYER, ROBERT J. SMITH, DONALD STULL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The University of Kansas and all individual defendants respectfully request that the Court deny the issuance of a petition for a writ of certiorari, seeking review of two judgments and opinions of the United States Court of Appeals for the Tenth Circuit entered on June 1, 1988. The opinions below are reported at 848 F.2d 1023 and 848 F.2d 1032.

STATEMENT OF THE CASE

Petitioner was hired as an associate professor of anthropology in 1966 and has been continued as an employee of the University of Kansas since that time. In December, 1982, petitioner filed her first lawsuit against the University of Kansas and twelve individual defendants, all University administrators or faculty members, in the federal District Court of Kansas in Topeka, Kansas, where the Honorable Richard D. Rogers sits as the sole district court judge. In the first action, Dist. Ct. Case No. 82-4291, the petitioner alleged discrimination by the University on the basis of sex in salary matters and retaliation by the University of Kansas, pursuant to 42 U.S.C. §2000 *et seq.* and the Equal Pay Act. Against the individual defendants, petitioner pleaded claims pursuant to 42 U.S.C. §§ 1981, 1983, 1985, and 1986.

On October 11, 1983, after ten months of litigation had passed, petitioner filed her first motion for disqualification of the district court judge. Concerning the untimeliness of this motion, the Tenth Circuit stated: "Discovery would have been completed by this time except for Dorothy Willner's recalcitrance in ignoring the defendants' request for more complete answers to their interrogatories." (Petitioner's Appendix, p.A10) Three years later, petitioner filed other motions for disqualification. The trial court, in denying each of petitioner's motions for disqualification, addressed each of the reasons alleged by plaintiff for disqualification of the judge. *See* Respondents' Appendices A-D, pgs. A1-23, *infra*. The Tenth Circuit held that the motions to recuse were untimely.

Now for the first time petitioner presents in her petition for a writ of certiorari the new allegation that the district judge served as a director of the University of Kansas Endowment Association, but there is neither evidence in the record nor an affidavit by petitioner to support this latest untrue statement.

On October 15, 1984, the district court dismissed the claims made against the individual defendants because plaintiff failed to

supplement interrogatory answers as directed by the court. Seventeen months had passed from the time defendants had served their interrogatories on petitioner in February, 1983. In addition, petitioner had not complied with two previous court orders to supplement her incomplete interrogatory answers, before the district court dismissed petitioner's claims against the individual defendants. See Respondents' Appendix E, p. A24, *infra*.

Petitioner's remaining claims against the University were tried in a fourteen-day trial in May, 1986, to the district judge after petitioner waived her right to a jury trial on the Equal Pay Act claim. In a lengthy opinion, the judge determined the issues on the merits against petitioner. (Petitioner's Appendix, p. A34)

In May, 1985, petitioner filed a second suit in the District Court of Kansas in Kansas City, Kansas, where the Honorable Dale E. Saffels sits as a district court judge. In the second action, Dist. Ct. No. 85-2288-S, petitioner alleged a conspiracy by six individual defendants, all administrators or faculty members of the University of Kansas, pursuant to 42 U.S.C. §§ 1983, 1985, 1986, and under pendant jurisdiction, various tort claims.

After the close of discovery in the second suit, defendants filed a motion for summary judgment, and the district court granted the motion and dismissed petitioner's claims.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

No real conflict exists among the circuit courts concerning the need for motions for judicial disqualification to be timely filed.

This Court recognized timeliness as an implicit requirement for motions for judicial disqualification, filed pursuant to 28 U.S.C. §455, in *Liljeberg v. Health Services Corp.*, —U.S. —, 108 S.Ct. 2194, 100 L.Ed. 2d 855, 877 (1988). In *Liljeberg*, decided before the Tenth Circuit considered and denied a petition for rehearing in the present case, this Court affirmed a Fifth Circuit opinion to vacate a judgment and held that it was appropriate to do so in cases "*unless* it can be said that respondent did not make a timely request for relief." 108 S.Ct. at 2206 (emphasis added). In the present case, the Tenth Circuit found that petitioner's motions for disqualification were untimely. (Petitioner's Appendix, pgs. A9-A11) The Tenth Circuit's decision in this action is consistent with other circuit courts concerning the need for motions for disqualification to be timely filed.

In the present case, petitioner's first motion for disqualification was not made until ten months after she had filed her case; her second motion was filed more than three years after the case had begun and after petitioner had known for one year the information upon which she based that motion. In *Hinman v. Rogers*, 831 F.2d 937 (10th Cir. 1987), the Tenth Circuit found a motion to recuse untimely when events were alleged to have occurred three months prior to the time the motion was filed. The *Hinman* court stated that: "A motion to recuse must be filed promptly after the allegedly disqualifying facts are discovered." 831 F. 2d at 938. The Tenth Circuit also found untimely a motion filed over a year after the occurrence of proceedings giving rise to the alleged bias in *Franks v. Nimmo*, 796 F.2d 1230, 1234 (10th Cir. 1976). The court cited with approval *Smith v. Danyo*, 585 F.2d 83, 86 (3d Cir.

1978), in which the Third Circuit stated: "[T]he judicial process can hardly tolerate the practice of a litigant with knowledge of circumstances suggesting possible bias or prejudice holding back, while calling upon the court for hopefully favorable rulings, and then seeking recusal when they are not forthcoming."

In previous decisions as well as in the present case, the Tenth Circuit has followed the position of other circuit courts. *See Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1396, 84 L.Ed.2d 785 (1985) (motion to recuse under both 28 U.S.C. §§ 144 and 455(a) was untimely); *Oglala Sioux Tribe v. Homestake Min. Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983); *United States v. Slay*, 714 F.2d 1093, 1094 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed. 2d 189 (1984); *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1164 (5th Cir. 1982); *In Re International Business Machines Corp.*, 618 F.2d 923, 932 (2d Cir. 1982). *See also Ann R. Willner v. University of Kansas*, 848 F.2d 1020, 1022–23 (10th Cir. 1988).

Petitioner's own citations of circuit court cases show that the circuit courts have recognized a timeliness requirement when considering motions filed pursuant to 28 U.S.C. §455. "Lack of a timeliness requirement encourages speculation and converts the serious and laudatory business of insuring judicial fairness into a mere litigation stratagem." *Delesdernier v. Porterie*, 666 F.2d 116, 121 (5th Cir. 1982), *cert. denied*, 459 U.S. 839 (1982). The Fifth Circuit in *Delesdernier*, noted that "[o]nly the Seventh Circuit has stated its opposition to any timeliness requirement." 666 F.2d at 122, f.n. 3, *citing SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977). In fact, *Morgan*, 557 F.2d 110, is the only case petitioner cites which supports her position that timeliness is not required for a motion filed pursuant to §455. In a case decided after *Morgan*, the Seventh Circuit stated:

> Our decision stands alone, however. The Fifth Circuit has called the discussion in *Morgan* dicta and rejected the

> conclusion on the merits, reasoning that Congress did not put a time limit in §455 because time limits were already so firmly fixed in both statute and common law that there was no need to add another.

United States v. Murphy, 768 F.2d 1518, 1539 (7th Cir. 1985).

More recently the Seventh Circuit recognized that "[a]lthough *SCA Services, Inc. v. Morgan, supra*, 557 F.2d at 117, holds that there are no time limits on motions to disqualify under 28 U.S.C. §455, this position has been uniformly rejected in the other circuits." *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 716 (7th Cir. 1986).

The legislative history of the 1974 amendment to 28 U.S.C. §455 is not decisive about whether Congress intended to preserve the judicial gloss wherein courts had generally held that a timely objection under the old §455 was necessary. *See, e.g., Adams v. United States*, 302 F.2d 307, 309 (5th Cir. 1962). Thus, Congress' failure to state an explicit timeliness requirement for §455 "could as easily have been the result of a belief that the judicial gloss on old §455 would survive." *Delesdernier*, 666 F.2d at 121. Certainly, the circuit courts have continued the judicial gloss on the old §455 since 1974.

Petitioner's statement that there is "disarray in the circuits on both timeliness and the proper interpretation" of §455 (Petition, p. 15) is not substantiated by decisions of the circuit courts. This Court's attention is not warranted for an issue upon which the circuit courts agree.

II.

The Tenth Circuit's decision affirming the district court's denial of disqualification motions does not conflict with decisions of this Court or other circuits.

Petitioner asserts that there is a conflict between *Liljeberg v. Health Services Corp.*, 108 S.Ct. at 2194, and the decision of the

Tenth Circuit in the present case. However, the facts of the two actions are clearly distinguishable, and the treatment of the cases by the respective appellate courts was completely different. In *Liljeberg*, 108 S.Ct. at 2197, this Court affirmed the decision of the Court of Appeals for the Fifth Circuit, which had reversed the district court and found that the judge should have been disqualified. In the present action, the Tenth Circuit found that petitioner's motions for disqualification were untimely and affirmed the district court's denial of those motions.

Unlike this case, *Liljeberg* presented a situation in which an objective observer might have reasonably questioned the impartiality of the judge. In *Liljeberg*, the district judge was a member of the university's governing board, and he had attended meetings where the specific matter was discussed which he subsequently decided in court. In the present action, petitioner filed a Title VII action against the University of Kansas because she disputed the amount of her salary. District Judge Richard Rogers was not a member of the University of Kansas' governing body and had served only in alumni organizations. The Alumni Association is a separate entity from the University of Kansas and plays no role in the hiring, promotion and salary decisions for University employees, including faculty members of the anthropology department like petitioner.

In considering petitioner's motion, the district judge stated: "Plaintiff does not allege nor could she allege that I acquired any facts concerning this case during my service as a director with the University Alumni Association. The Court has no knowledge of this case other than what I have learned from perusing the court file." *See* p. A5, *infra*. The district judge then applied the "reasonable, objective man" standard for reviewing a motion for recusal. *See* p. A5, *infra*. Judge Rogers stated that he did not believe his "past association with the Alumni Association demonstrates actual bias under the circumstances of this case and I do

not think that a reasonable man would doubt my impartiality under these circumstances." *See* p. A5, *infra*.

More than three years later, petitioner alleged a new ground that the judge had a position on the Law School Board of Governors for the KU Law Society. This society, whose members are alumni of the law school, does not consider or decide personnel matters of the University. In denying this motion, the district court stated: "[P]laintiff has known about my previous association with the law school at the University of Kansas for over a year, and she has waited until a month before the trial of this case is to start to raise it in a motion for disqualification. This delay certainly makes this aspect of the plaintiff's motion untimely." *See* Respondents' Appendix B, p. A18, *infra*. The Tenth Circuit noted that the district judge's participation in alumni activities had been considered in an earlier case and that "in *Hinman*, another panel of this court concluded that the allegations in Myra Hinman's recusal requests did not support a motion for recusal under section 144 or section 455." (Petitioner's Appendix, p. A10, *citing Hinman v. Rogers*, 831 F.2d at 939–40.)

The district court's treatment of petitioner's disqualification motions is consistent with many appellate opinions which have denied motions for disqualification based on a judge's background where no specific facts "suggest that the trial judge would be anything but impartial in deciding the case before him." *Parrish v. Board of Commissioners of Alabama State Bar*, 524 F.2d 98, 101 (5th Cir. 1975) *(en banc), cert. denied*, 425 U.S. 944 (1976). "[A]n alumnus' interest in the general welfare of his alma mater hardly seems likely to manifest itself in a bias concerning a single staff employment decision." *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 12 (1st Cir. 1981), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1731, 72 L.Ed. 2d 148 (1982). The district judge's alumni service does not exceed what might be expected as background or associational activities with respect to the usual

district judge. *See Parrish*, 524 F.2d at 104 (5th Cir. 1975) (recusal not required in race discrimination action against state bar association in which trial judge was a past president); *State of Idaho v. Freedman*, 478 F.Supp. 33 (D.Idaho 1979) (recusal not required in case challenging ratification procedure for Equal Rights Amendment where trial judge held "prominent position" in the Mormon Church).

Petitioner improperly raises in her petition for a writ of certiorori a new and unsupported allegation against the district judge which she did not present to the district judge, nor by supporting affidavit, to the Tenth Circuit. Petitioner's latest allegation against the district judge was that he had been a director of the University of Kansas Endowment Association, but there is no evidence to support her statement either in the record, or in fact. Petitioner never made this allegation before the district court so that the judge would have had an opportunity to address petitioner's misunderstanding. Nor did the appellate court have any evidence upon which to consider petitioner's latest untrue allegation against the district judge. In *Hinman v. Rogers*, 831 F.2d 937, 940 (10th Cir. 1987) the Tenth Circuit decided that "allegations in the recusal request do not support the claim that the judge has a financial interest in defendant Kansas University Endowment Association."

The district judge repeatedly answered petitioner's unfounded allegations against him in a series of motions for disqualification. *See* Appendix C, p. A19, *infra* (denial that judge is biased because petitioner is Jewish); Appendix D, p. A23, *infra* (denial that judge was related to a defense attorney). The Tenth Circuit reviewed the district court's decisions on petitioner's various motions and found that the denial of the motions did not constitute an abuse of discretion. No conflict exists between *Liljeberg* and the Tenth Circuit's decision in the present case.

III.

The district court's orders to petitioner to supplement interrogatory answers did not impinge on petitioner's right to observe three holy days.

There is no merit in petitioner's contention that the court imposed discovery requirements incompatible with petitioner's religious observance. Defendants served interrogatories on petitioner in February, 1983. After receiving incomplete answers from petitioner on July 1, 1983, they filed a motion to compel complete answers. By order dated March 5, 1984, the magistrate directed petitioner to supplement her interrogatory answers by March 30, 1984. Petition failed to comply with this discovery order and had not done so when defendants filed a motion to dismiss on August 10, 1984. Prior to a September 18, 1984 hearing on defendants' motion, petitioner had "notice for more than one year . . . that the defendants were seeking a further response to their interrogatories." (Petitioner's Appendix, p. A12).

At a hearing in September, 1984, petitioner "indicated that she would need forty-five additional days to supplement the interrogatories" although she had failed to comply with the magistrate's order for more than six months. *See* Respondents' Appendix C, p. A20. After the hearing, in an order on September 19, 1984, the district court gave petitioner one final ten-day extension to supplement the interrogatory answers and explicitly advised petitioner that failure to obey this *second* order to respond fully to the interrogatories would result in dismissal of the claims against the individual defendants. *See* Respondents' Appendix E, p. A24, *infra*. Petitioner did not meet the unambiguous deadline set by the court, and on October 15, 1984, petitioner's claims against the individual defendants were dismissed. (Petitioner's Appendix, p. A26).

The district court would have been acting well within its discretion in granting the motion to dismiss on September 19,

1984. Petitioner's willful failure to comply with the court's order at that time had already continued for many months without justification. Instead, the district court judge chose to grant petitioner one last opportunity to correct her default and explicitly cautioned her that "[f]ailure to comply with this order will result in the dismissal of this action against the individual defendants." (Petitioner's Appendix, p.A27). Despite ample notice of the consequences of not meeting this final deadline, petitioner did not comply with the district court's order.

On appeal, petitioner challenged the September 19, 1984 order as an infringement of her constitutional right to exercise her religion. This contention is undermined by her six-month default that preceded the order, by the district court's willingness to give petitioner yet another opportunity to cure her failure, and by the fact that the first day of petitioner's religious observance was not until September 26, 1984. As the Tenth Circuit observed, petitioner "was given up to ten days to comply with the court's order. She was free to budget her time to complete her responsibilities to the court in less than the maximum allotted time and before September 26, 1984," the first day of the Jewish New Year. (Petitioner's Appendix, p.A14). In addition, as even petitioner concedes, the Jewish High Holy Days do not mandate abstention from work during the entire ten-day period between Rosh Hashanah and Yom Kippur, but at most require prayer and presence in synagogue for two days during Rosh Hashanah and one day on Yom Kippur.

The crux of a First Admendment freedom of religion claim is a governmentally imposed pressure on a person to forego the practice of a faith in such way that the person is forced to choose between following the precepts of the religion and complying with the requirements set by the state. *See, e.g., Sherbert v. Verner,* 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965, 970 (1963). "[I]t is necessary in a free exercise case for one to show the coercive

effect of the enactment as it operates against him in the practice of his religion." *Abington School District v. Schempp,* 374 U.S. 203, 223, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

With regard to obligations imposed by courts that may conflict with religious practices, it has been held that a criminal defendant's First Amendment interest in not having to attend trial on his holy day did not outweigh the compelling interest in using Fridays for trial days. *United States v. Fisher,* 571 F. Supp. 1236 (S.D.N.Y. 1983), *aff'd., United States v. Thomas,* 757 F.2d 1359 (2d Cir. 1985), *cert. denied,* 474 U.S. 819 (1985). In the present case, there is not even an arguable impingement, restriction or limitation on religious observance about which petitioner can complain. Besides the six months of her non-compliance with a discovery order, petitioner had seven days after September 19, 1984 in which to prepare five supplemental interrogatory answers, without regard to the three High Holy Days. The district court was extremely lenient in allowing petitioner a final opportunity to comply with the discovery order and cannot reasonably be accused of depriving petitioner of her right to observe her religion.

If a party fails to obey a court order to provide discovery, the court may dismiss the action. Fed.R.Civ.P. 37(b)(2)(C). The imposition of sanctions is within the trial court's discretion and will not be disturbed on appeal unless the court has abused its discretion. *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 763, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 642, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976). The Tenth Circuit affirmed the trial court's decision.

Petitioner here willfully disregarded two separate discovery orders. Her default had lasted for more than six months by the time the district court finally granted the motion to dismiss the individual defendants. No First Amendment issue or other important question of federal law is presented here upon which the granting of certiorari could be premised. Sup. Ct. Rule 17.1(c).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

(August 30, 1984)

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS, ARCHIE R. DYKES, DELBERT M. SHANKEL, FRANCES D. HOROWITZ, ROBERT P. COBB, ROBERT S. HOFFMAN, ROBERT J. SQUIER, ANTA MONTET WHITE, FELIX MOOS, JOHN M. JANZEN, MICHAEL CRAWFORD, DAVID FRAYER and DONALD STULL,
Defendants.

Case No. 82-4291

In the United States District Court
for the District of Kansas

MEMORANDUM AND ORDER

This is an employment discrimination action brought by the plaintiff pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988, 2000e *et seq.* (Title VII); 29 U.S.C. § 206(d) (Equal Pay Act); 20 U.S.C. § 1681, *et seq.* (Title IX); and the United States Constitution. Named as defendants are the University of Kansas; Archie R. Dykes, Chancellor; Delbert M. Shankel, Executive Vice CHancel-

lor[sic]; Frances D. Horowitz, Vice Chancellor, Dean of Graduate School, Associate Dean of Liberal Arts College; Robert P. Cobb, Executive Vice Chancellor, Dean of Liberal Arts College; Robert S. Hoffman, Associate Dean of Liberal Arts College; Robert J. Squier, Acting Chairman of Department of Anthropology; Anta Montet White, Chairman of Department of Anthropology; Felix Moos, Associate Chairman of Department of Anthropology; John M. Janzen, Associate Chairman of Department of Anthropology; David Frayer, Associate Professor of Anthropology; and Donald Stull, Associate Professor of Anthropology. This matter is presently before the court upon the following motions: (1) defendants' motion for more definite statement (Doc. #19); (2) defendants' motion to dismiss (Doc. #20); and (3) plaintiff's motion to disqualify the court (Doc. #78). Having carefully reviewed the pleadings that have been filed by both sides, the court is now prepared to rule.[1]

Plaintiff, with the aid of counsel, filed this case on December 1, 1982. Plaintiff's counsel has since withdrawn and now plaintiff is proceeding *pro se.* In her complaint, plaintiff alleges that she is a 55 year old Jewish American female. She further alleges that she has been employed by the University of Kansas as an anthropology professor since 1966. She contends that during her employment she has been discriminated against by the defendants in a variety of ways because of her race and sex. Plaintiff seeks actual damages in excess of $1,000,000.00 and punitive damages in excess of $2,000,000.00.

The court shall first consider plaintiff's motion for disqualification pursuant to 28 U.S.C. § 455(a) and 455(b)(1). In this motion, plaintiff suggests three reasons why my impartiality should be questioned in this case: (1) that I was a director of the University of

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1. On December 14, 1983, plaintiff asked for additional time to reply to defendants' motion to dismiss. The court granted plaintiff's motion without indicating a specific time for filing the supplemental material. To date, plaintiff has submitted nothing further with regard to the motion to dismiss. The court finds that it is now time to decide the motion.

Kansas Alumni Association when plaintiff filed her charge of discrimination against the University of Kansas with the Equal Employment Opportunity Commission; (2) that plaintiff has been informed that I was heard to make the following statement with regard to sex discrimination cases filed by females by the defendant University of Kansas: "Those women over there! If they don't get the high-paying jobs they want, they holler discrimination."; and (3) that plaintiff has observed my demeanor during a hearing toward another female plaintiff proceeding *pro se* and questions whether I am able to give full consideration to females litigating sex discrimination cases on their own behalf. I shall discuss each of these contentions specifically. However, I should initially discuss the general standards governing a motion to disqualify.

There are two statutes governing recusal of federal district judges: 28 U.S.C. §§ 144 and 455. Plaintiff seeks to invoke § 455 in support of her motion for disqualification. That statute provides in pertinent part:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Although the statute imposes a self-enforcing duty upon the judge, its provisions may also be asserted by a party to the proceeding. *United States v. Gigax*, 605 F.2d 507, 511 (10th Cir. 1979).

Section 455(b)(1) is substantially similar to 28 U.S.C. § 144. Courts have concluded that the standards for disqualification for personal bias are identical under both. *See, e.g., United States v. Gigax, supra*, at 512; *United States v. Wolfson*, 558 F.2d 58, 62 (2d Cir. 1977). The standard is whether a reasonable person would conclude, on the basis of the facts alleged, that a judge is biased or

prejudiced against a particular litigant. *United States v. Conforte,* 624 F.2d 869, 880 (9th Cir. 1980), *cert. denied,* 449 U.S. 1012 (1980). To warrant disqualification of a judge under this section, a party must allege personal, extra-judicial bias or prejudice. *In re Corrugated Container Antitrust Litigation,* 614 F.2d 958, 965 (5th Cir. 1980).

Section 455 (a) is broader and more general in nature than either 28 U.S.C. § 144 or § 455(b)(1). It does not rest on the personal bias or prejudice structure of those two sections. It mandates that a judge disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." This provision was added in 1974, and designed as a "catch-all" for situations not otherwise contemplated under the statutes but in which disqualification might be proper. *Rice v. McKensie,* 581 F.2d 1114, 1116 (4th Cir. 1978). Section 455(a) represents a recognition by Congress that the appearance of impartiality is as important as the fact of impartiality, *Webb v. McGhie Land Title Co.,* 549 F.2d 1358 (10th Cir. 1977), and its wording is borrowed from the ABA Code of Judicial Conduct. *United States v. Ritter,* 540 F.2d 459, 462 (10th Cir. 1976), *cert. denied,* 429 U.S. 951 (1976). Disqualification is warranted under this provision when a reasonable person measured by an objective standard would infer that a judge's impartiality might reasonably be questioned. *United States v. Gigax, supra,* at 511. Application of this "reasonable, objective man" standard must proceed in the context of allegations of concrete fact. *United States v. Corr,* 434 F.Supp. 408 (S.D.N.Y. 1977). A charge of partiality must be supported by a factual basis. *In re United States,* 666 F.2d 690, 695 (1st Cir. 1981). Rumors and innuendos must be ignored in considering whether disqualification is appropriate. *Id.* Section 455(a) should not be interpreted to require recusal on spurious or vague charges of impartiality. *Smith v. Pepsico,* 434 F.Supp. 524 (S.D. Fla. 1977).

The court shall now consider the various specific allegations made by the plaintiff in her motion. Plaintiff first suggests that I should disqualify myself from this case because I was a director of the

University of Kansas Alumni Association when plaintiff filed her charge of discrimination against the University of Kansas with the Equal Employment Opportunity Commission. Assuming this to be true, and I do believe that the dates of my prior service as a director of Alumni Association do coincide with plaintiff's filing of her charge with the EEOC, I find this fact insufficient to require my recusal in this case.

Plaintiff does not allege nor could she allege that I acquired any facts concerning this case during my service as a director with the University Alumni Association. The court has no knowledge of this case other than what I have learned from perusing the court file.

I do not believe my past association with the Alumni Association demonstrates actual bias under the circumstances of this case and I do not think that a reasonable man would doubt my impartiality under these circumstances. The mere association of a judge with a party, without indication that the judge stands to obtain financial or other gain from a particular outcome, is generally insufficient to mandate disqualification. *Brody v. President & Fellows of Harvard College,* 664 F.2d 10, 11 (1st Cir. 1981). I have reviewed a number of cases arising under § 455 and I do not think that my association with the Alumni Association is nearly as significant as other associations which have been found by various courts not to require recusal. *See, e.g., Huff v. Standard Life Ins. Co.,* 683 F.2d 1363 (11th Cir. 1982) (recusal not required where trial judge had previous affiliation with defendant's law firm); *Schultz v. Newsweek,* 668 F.2d 911 (6th Cir. 1982) (recusal not required where defendant newspaper in published editorials had supported trial judge's nomination to Circuit Court position); *Parrish v. Board of Commissioners of Alabama State Bar,* 524 F.2d 98 (5th Cir. 1975) *(en banc), cert. denied,* 425 U.S. 944 (1976) (recusal not required in race discrimination action against state bar association in which trial judge was a member); *Warner v. Global Natural Resources PLC,* 545 F.Supp. 1298 (S.D. Ohio 1982) (recusal not required

where trial judge had acquaintanceship with plaintiff and plaintiff had supported judge's nomination to the bench); *State of Idaho v. Freedman,* 478 F.Supp. 33 (D. Idaho 1979) (recusal not required in case challenging ratification procedure for Equal Rights Amendment where trial judge held "prominent position" in the Mormon Church); *Black v. Sullivan & Cromwell,* 418 F.Supp. 1 (S.D.N.Y. 1975) (recusal not required in sex discrimination class action where trial judge was previously an NAACP litigator). In sum, I find my prior service with the University of Kansas Alumni Association insufficient to require recusal here.

I now move to consideration of the statement allegedly made by me concerning sex discrimination cases filed by females at the University of Kansas. The presentation of this allegation presents much the same situation as that in *United States v. Hines,* 696 F.2d 722 (10th Cir. 1982). There, the defendant sought to disqualify the trial judge pursuant to 28 U.S.C. §§ 455(a) and 455(b)(1) based on a statement made by the judge. The defendant submitted an affidavit stating that someone had told him that the judge, sometime in November or December, 1979, while dining with friends at an unnamed dinner club in Tulsa, Oklahoma, stated to an unnamed person that he was "going to see to it that [Mr. Hines] gets put away." The trial judge refused to recuse himself and the Tenth Circuit affirmed. In finding that the defendant had failed to show adequate proof of prejudice or bias, the Court stated:

> Mr. Hines' affidavit fails to state with reasonable particularity when, where, and to whom the statement was made, nor has he identified the informant who heard the statement and reported it to Mr. Hines. His counsel also concedes that, notwithstanding the attorney-client privilege, Mr. Hines has not identified to him the source of the statement. Record, vol. 1, at 139. Mr. Hines states in summary fashion that the informant was known to him to be reliable and to have been in a position to hear the judge's statement, but he offers no underlying facts to support either his opinion of the informant's reliability or his belief that the informant was in a

> position to hear the statement. Justice would be impeded by a policy mandating recusal on such scant submissions. Although we acknowledge that the intent in amending section 455 was to negate even the appearance of partiality in judicial proceedings, section 455(a) must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice.

Id., at 729.

The statements made by the Tenth Circuit in *Hines* are particularly instructive here. In her motion, plaintiff fails to state with any particularity when, where and to whom the statement was made, nor has she identified who heard the statement and reported it to her. In accord with *Hines*, I find that plaintiff has failed to show sufficient proof of bias, prejudice or partiality.

Finally, I shall consider plaintiff's last allegation of prejudice or bias. Plaintiff contends that my demeanor in a hearing in another case concerning another female *pro se* plaintiff indicates some prejudice or bias against all females who are prosecuting cases in their own behalf. The law is clear that this allegation is insufficient for several reasons. First, as noted previously in this opinion, to warrant disqualification of a judge under § 455, a party must allege personal bias or the appearance of partiality arising out of that bias. Plaintiff's contention fails to allege any bias which could be considered "personal" to her. Second, plaintiff's allegation presents nothing more than her conclusions regarding my demeanor at some prior hearing in another case. The law is clear that only facts, and not conclusions, will serve as a basis for disqualification. *United States v. Bennett*, 539 F.2d 45 (10th Cir. 1976), *cert. denied*, 429 U.S. 925 (1976). Finally, the bias and prejudice under § 455 must be extra-judicial. Disqualifying bias, with certain limited exceptions none of which are applicable here, may not arise out of the proceedings in court before the judge. Thus, I find recusal is not required by this allegation made by plaintiff. *See Jackson v.*

Alabama Dept. of Public Safety, 657 F.2d 689 (5th Cir. 1981) (comments made by trial judge in another judicial proceeding do not require recusal).

In sum, I find plaintiff has not shown actual bias or prejudice and I do not think that a reasonable man would doubt my impartiality under the circumstances presented. Accordingly, plaintiff's motion for disqualification shall be denied.

Having decided the motion for disqualification, I shall move to the other motions presently pending in this case. The court shall first consider defendants' motion for a more definite statement. In this motion, defendants seek to have plaintiff provide a number of factual details regarding the allegations made by her in her complaint.

In *Grant v. Rusty's Food Center, Inc.,* No. 82-4289 (D. Kan., unpublished, 1/20/83), the court set forth the following standards for examining a motion for more definite statement:

> The decision whether to grant a motion for a more definite statement is a matter within the discretion of the trial court. *United States v. Metro Development Corp.,* 61 F.R.D. 83, 85 (N.D. Ga. 1973). Such motions, however, are generally disfavored. *Usery v. Local 866, International Brotherhood of Teamsters,* 72 F.R.D. 581, 582 (W.D. Okla. 1976). If a pleading meets the requirements of F.R.Civ.P. 8 and fairly notifies the opposing party of the nature of the claim, a motion for more definite statement should not be granted. *Wishnick v. One Stop Food & Liquor Store, Inc.,* 60 F.R.D. 496, 498 (N.D. Ill. 1973). In 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1376, p. 733, the rule regarding motions for a more definite statement is succinctly stated as follows:
>
> > [T]he class of pleadings that are appropriate subjects for a motion under Rule 12(e) is quite small—the pleading must be sufficiently intelligible for the court to be able to make out one or more potentially viable legal theories on which the claimant might proceed, but it must be so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith or without prejudice to himself.

> Moreover, it has been recognized that the purpose of a Rule 12(e) motion is "to strike at unintelligibility rather than want of detail." *U-Profit, Inc. v. Bromley, Ltd.*, 54 F.R.D. 60, 66 (E.D. Wis. 1971).

After reviewing plaintiff's complaint, we find that it sufficiently complies with Fed.R.Civ.P. 8. Further details about plaintiff's complaint can be obtained through interrogatories, depositions and other discovery. Accordingly, defendants' motion for more definite statement shall be denied.

In the motion to dismiss, defendants raise a number of issues. Many of these matters are familiar to the court. The court shall summarily dispose of several of the issues without discussion. The remaining questions will be discussed.

1. Plaintiff's claims against the defendant University of Kansas and the individual defendants in their official capacities pursuant to 42 U.S.C. §§ 1981, 1983, 1985 and 1986 are barred by the Eleventh Amendment. *Pennhurst State School and Hospital v. Halderman*, _____ U.S. _____ (January 24, 1984); *Brennan v. University of Kansas*, 451 F.2d 1287, 1290 (10th Cir. 1971); *Logan v. State of Kansas Department of Human Resources*, No. 83-4321 (D. Kan., unpublished, 6/12/84). These claims shall be dismissed. With the dismissal of these claims, the court shall also dismiss plaintiff's claim for attorney's fees against the University pursuant to 42 U.S.C. § 1988.

2. Compensatory and punitive damages are not allowable under Title VII. *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1364 (11th Cir. 1982); *Pearson v. Western Electric Co.*, 542 F.2d 1150, 1151-52 (10th Cir. 1976); *Hinman v. University of Kansas*, No. 79-4069 (D. Kan., unpublished, 5/1/80). Any claim for such damages by plaintiff under Title VII shall be dismissed.

3. 42 U.S.C. § 1981 does not encompass claims based on sex or religious discrimination. *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979).

4. Plaintiff cannot obtain equitable relief in the form of back pay from the individual defendants under Title VII. *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982); *Clanton v. Orleans Parish School Board*, 649 F.2d 1084, 1099 (5th Cir. 1981); *Dobrec v. Robinson*, No. 79-1671 (D. Kan., unpublished, 6/1/84). Such claims made by plaintiff are dismissed.

5. There is no right to a jury trial under Title VII. *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 940 (10th Cir. 1979). This claim shall be tried to the court.

6. Plaintiff's claims against the University and the individual defendants brought directly under the Constitution pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) shall be dismissed. *Howard v. Topeka-Shawnee County Metropolitan Planning Commission*, No. 80-4199 (D. Kan., unpublished, 2/7/83); *Lee v. Wyandotte County*, No. 81-4276 (D. Kan., unpublished, 1/27/84).

The court shall now discuss the remaining issues raised by the defendants. We shall first address the service of process issues. Defendant University and defendant Horowitz contend that they were improperly served here. Plaintiff, in response to defendants' motion, has again served both the University and Horowitz. This additional service by plaintiff adequately complies with service requirements and thus we now find no merit to the defendants' arguments.

The individual defendants assert several arguments that plaintiff's claims under §§ 1983, 1985 and 1986 should be dismissed for failure to state a claim upon which relief can be granted. The gist of these contentions is that the complaint is bereft of facts to adequately state constitutional or statutory claims. The general rule with regard to such arguments is that complaints should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). This complaint is

indeed not a model of pleading but we find it is sufficient to avoid a motion to dismiss for failure to state a claim. Several of these arguments might again be raised in a motion for summary judgment if discovery fails to reveal facts necessary to support these claims.

All defendants assert that plaintiff has adequately failed to plead a cause of action under the Equal Pay Act (EPA). The court has carefully examined plaintiff's complaint and we believe that a fair reading of that complaint adequately states a claim under the EPA. Accordingly, we shall not dismiss plaintiff's EPA claim against the defendants.

We now move to defendants' argument that plaintiff has failed to state a claim under § 1981 and Title VII based on race discrimination. Defendants argue that these statutes do not encompass racial discrimination based on the fact that an individual is Jewish. Plaintiff, relying upon *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979), contends that she can sue as a Jew under § 1981 and Title VII for race discrimination.

Section 1981 provides, *inter alia,* that all persons within the United States shall enjoy the same rights and benefits of law as are "enjoyed by white citizens." The Supreme Court has held that the scope of § 1981 applied to acts of racial discrimination. *Johnson v. Railway Express Agency,* 421 U.S. 454, 459-60 (1975). It does not apply to discrimination based on sex or religion. *Runyon v. McClary,* 427 U.S. 160, 167 (1976). The Court has left open the question as to whether § 1981 applies to discrimination based on national origin. *Delaware State College v. Ricks,* 449 ULS. 250, 256 n. 6 (1980).

This court has applied the teaching of *Manzanares* in the past to allow and disallow § 1981 claims of discrimination based on a variety of ethnic or national origins. *See Fernando v. Brock Hotel Corp.*, No. 83-4057 (D. Kan., unpublished, 12/12/83) (allowed for Indian ancestry); *Schlaefli v. Daniel International Corp.*, No.

80-4052 (D. Kan., unpublished, 8/31/82) (allowed for American Indian); *Elkassabany v. King Radio Corp.*, No. 79-4193 (D. Kan., unpublished, 10/3/80) (allowed for Egyptian); *Mills v. American Yearbook Co., Inc.*, No. 81-4222 (D. Kan., unpublished, 7/26/82) (not allowed for Finnish ancestry); *Cavanaugh v. Harris Enterprises, Inc.*, No. 79-4177 (D. Kan., unpublished, 3/19/80) (not allowed for German).

Title VII is violated by discrimination on the basis of "race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2 (c)(1). Plaintiff's complaint alleges solely sex and race discrimination. The complaint makes no mention of any discrimination based on religion or national origin. Thus, we consider plaintiff's Title VII claim as only a race and sex discrimination claim.

After examining the case law on this issue, we are forced to reach the conclusion that Jews do not constitute a race for purposes of § 1981 or Title VII. *Wald v. Teamsters*, 25 E.P.D. ¶ 31,497 (C.D. Cal. 1980). The court finds itself in agreement with the comments of the court in *Budinsky v. Corning Glass Works*, 425 F.Supp. 786 (W.D. Pa. 1977). There, the court, in dismissing a Slavic plaintiff's § 1981 claim of racial discrimination, stated:

> The terms "race" and "racial discrimination" may be of such doubtful sociological validity as to be scientifically meaningless, but these terms nonetheless are subject to a commonly-accepted, albeit sometimes vague, understanding. . . . On this admittedly unscientific basis, whites are plainly a "race" susceptible to "racial discrimination." Hispanic persons and Indians, like blacks, have been traditional victims of group discrimination, and, however inaccurately or stupidly, are frequently and even commonly subject to a "racial" identification as "non-whites." . . . .
>
> *The same cannot be said with respect to persons of Slavic or Italian or Jewish origin. These groups are not so commonly identified as "races" nor so frequently subject to that "racial" discrimination which is the specific and exclusive target of § 1981.* (emphasis added)

Id., at 788.

Therefore, we shall dismiss plaintiff's claims of racial discrimination based on § 1981 and Title VII.

Defendants next argue that there are several problems with plaintiff's Title VII claim. Defendants first suggest plaintiff's Title VII claim should be dismissed because her complaint fails to adequately allege that her administrative charge of discrimination was deferred to the Kansas Commission on Civil Rights (KCCR) as required by 42 U.S.C. § 2000e-5(c). Defendants note that plaintiff's complaint indicates only that plaintiff filed a charge of discrimination with the EEOC on April 27, 1981. In response, plaintiff has submitted documents which show that the EEOC received plaintiff's charge on April 27, 1981, and transmitted it to the KCCR on April 28, 1981. The documents further indicate that the KCCR declined to process the charge.

Once a state agency is given the opportunity to act and declines to do so, the EEOC can proceed at once to deal with the complainant's charge of discrimination. *Willner v. University of Kansas*, No. 79-4069 (D. Kan., unpublished, 5/1/80). The failure of a complainant to file charges with the state agency is not a fatal jurisdictional defect where the charge is filed with the EEOC, which as matter of policy, refers such complaints to the proper state agency. *Heiniger v. City of Phoenix*, 625 F.2d 842 (9th Cir. 1980). Given the facts presently before the court, we shall not dismiss plaintiff's Title VII claim.

Defendants next argue that plaintiff's Title VII claim should be dismissed because plaintiff's EEOC charge shows that it was not filed within 180 days of any alleged violations by the defendants. We cannot agree. The court finds that the EEOC charge sufficiently alleges violations of Title VII within 180 days of its filing. Accordingly, we find no merit to this argument. However, we do note that several of the allegations do appear to be outside the 180 time restriction. We believe that these matters should probably be addressed in a motion for summary judgment after discovery is complete.

Finally, certain individual defendants contend that plaintiff's Title VII claim against them should be dismissed because they were not named in plaintiff's EEOC charge of discrimination. The court has addressed this issue a number of times.

In *Romero v. Union Pacific Railroad*, 615 F.2d 1303 (10th Cir. 1980), the Tenth Circuit examined this issue and found that four factors should be considered in deciding whether a defendant unnamed in the EEOC charge could be named later in a Title VII suit. The four factors are:

> 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests of a named are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Id., at 1312.

The court is and has always been reluctant to decide this issue on a motion to dismiss. We find it is better resolved after some discovery has been taken in the case. The instant case is no exception. Thus, we shall await a motion for summary judgment before thoroughly examining this issue.

The court shall now move to defendants' arguments regarding plaintiff's Title IX claim. The University first asserts that plaintiff's Title IX claim against it is barred by the Eleventh Amendment. The court agrees.

A clear showing of congressional intent is required to abrogate Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332 (1979). No such congressional purpose is present here and thus

we find that plaintiff's Title IX action against the University is barred by the Eleventh Amendment.

Defendants also raise several other arguments concerning the Title IX claim. Defendants contend that plaintiff has no cause of action under Title IX because she has received no federal grants or funding. Defendants made this argument prior to the Supreme Court's decision in *Grove City College v. Bell*, _____ U.S. _____ (February 28, 1984). The court believes that both sides should examine this case before we decide this issue. At this time, we shall deny defendants' motion to dismiss based upon this argument but we shall allow defendant to raise it at a later date if they believe that *Grove City College* requires it.

As to defendants' remaining arguments regarding plaintiff's Title IX claim, the court believes they are meritorious. There is no right to damages or jury trial under Title IX. *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982).

Defendants next argue that plaintiff's slander claim fails to state a claim under § 1983. The court agrees. Claims of defamation by a state official, when no termination of employment is involved, are not cognizable under § 1983. *Paul v. Davis*, 424 U.S. 693, 710 (1976). Plaintiff contends that the court should consider this claim under its pendent jurisdiction if a § 1983 claim is not stated. The court will do so but only to the extent that such a claim is stated within the applicable one year statute of limitations. If discovery reveals that no such claim arose between December 1, 1981 to December 1, 1982, this claim shall be dismissed.

Finally, we shall consider defendants' statute of limitations argument. Defendants seek to have the court rule that plaintiff's claims under §§ 1981, 1983 and 1985 prior to either December 1, 1981 or December 1, 1980, are barred by the applicable statute of limitations. At this point, we are inclined to find, based upon the recent pronouncements of the Tenth Circuit, that December 1,

1979, is the key date, three years prior to the filing of plaintiff's complaint. *See Cotton v. Board of Education of U.S.D. # 259,* No. 82-4082 (D. Kan., unpublished, 5/3/84). The court shall examine this issue closer after discovery reveals the exact nature of plaintiff's claims.

The court notes that the individual defendants have recently filed a motion to dismiss. A hearing on this motion is hereby scheduled for September 18, 1984, at 8:30 a.m., in Room 401 of the Frank Carlson Federal Building, 444 S.E. Quincy, Topeka, Kansas.

IT IS THEREFORE ORDERED that plaintiff's motion for disqualification be denied.

IT IS FURTHER ORDERED that defendants' motion for more definite statement be denied.

IT IS FURTHER ORDERED that defendants' motion to dismiss be granted in part and denied in part.

IT IS FURTHER ORDERED that the pending motion to dismiss filed by the individual defendants shall be scheduled for a hearing on September 18, 1984, at 8:30 a.m.

IT IS SO ORDERED.

Dated this 29th day of August, 1984, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

APPENDIX B

(February 18, 1986)

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS,
Defendant.

Case No. 82-4291

In the United States District Court
for the District of Kansas

O R D E R

This matter is presently before the court upon plaintiff's motion to the court to disqualify itself and plaintiff's motion for continuance and stay. Having carefully reviewed the materials before the court, we are now prepared to rule.

The court shall first consider the plaintiff's motion to disqualify. In this motion, plaintiff seeks to have me disqualified pursuant to 28 U.S.C. § 455(a) because (1) I previously served as the President of the Board of Governors of the law school at the University of Kansas, and (2) I am related to an attorney who previously appeared in this lawsuit. Plaintiff's previous attempt to have me disqualified in this case was denied. This attempt shall meet the same fate. For the reasons stated in my earlier order, I do not find that my service on the Board of Governors is sufficient to mandate my recusal in this action. *See* Doc. #128.

Further, plaintiff has known about my previous association with the law school at the University of Kansas for over a year, and she was waited until a month before the trial of this case is to start to raise it in a motion for disqualification. This delay certainly makes this aspect of the plaintiff's motion untimely. *See Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984).

Plaintiff's allegation that I am related to an attorney who previously appeared in this case is completely untrue. I have no idea where plaintiff came up with this allegation, but it is incorrect and requires no further comment. Accordingly, plaintiff's motion for disqualification shall be denied.

The court shall next consider plaintiff's motion for continuance and stay. In this motion, plaintiff seeks a continuance of the March 10, 1986 trial date until "the Court has instructed Robert T. Stephan, Attorney General of the State of Kansas, who is defending defendant University, to indict agents of defendant University who are defendant University's witnesses for perjury, to try them for perjury and have such trial brought to conclusion and sentencing before the trial in the instant actions begins." This motion is entirely frivolous and shall be denied. This case shall proceed to trial on March 10, 1986.

IT IS SO ORDERED.

Dated this 18th day of February, 1986, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

APPENDIX C

(March 13, 1985)

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS, et al.,
Defendants.

Case No. 82-4291

In the United States District Court
for the District of Kansas

MEMORANDUM AND ORDER

Plaintiff, proceeding in this action *pro se,* has filed an affidavit (Doc. #208) in which she moves to disqualify the undersigned judge from further service in this matter. Plaintiff also seeks a stay of this action. Having carefully reviewed the affidavit, I am now prepared to rule.

Plaintiff's instant motion is made pursuant to 28 U.S.C. § 144. This section provides a procedure whereby a litigant may seek recusal of a judge for "personal bias either against him or in favor of any adverse party." In order to effect recusal under this statute, the party must file a timely and sufficient affidavit stating the facts and reasons for his belief that prejudice exists, and the affidavit is to be accompanied by a "certificate of counsel of record" stating the affidavit is made in good faith.

Plaintiff's affidavit suggests that I am biased against her because she is Jewish. Plaintiff reaches this conclusion based on certain past

rulings made by the court in this case. The facts which give rise to plaintiff's affidavit can be summarized as follows. On March 5, 1984, the court directed the plaintiff to supplement certain answers to interrogatories that had been propounded by the individual defendants by March 30, 1984. On August 30, 1984, defendants filed a motion to dismiss pursuant to Fed.R.Civ.P. 37(b) for plaintiff's failure to supplement the interrogatories. Thereafter, a hearing was held on that motion on September 18, 1984. At the hearing, plaintiff, a practicing Jew, indicated that she would need forty-five additional days to supplement the interrogatories because of upcoming Jewish holidays. On September 19, the court, while believing that dismissal was indeed appropriate for plaintiff's failure to comply with this court's order of March 5, 1984, declined to grant defendants' motion and gave plaintiff another ten days in which to supplement the interrogatories. In that order, the court stated: "Failure to comply with this order will result in the dismissal of this action against the individual defendants." Therefore, on September 24, 1984, plaintiff filed a motion for a ten day extension of time to comply with the court's order. Plaintiff sought an additional ten days because of the Jewish holidays beginning on September 26 and continuing until October 7, 1984. On October 15, 1984, the court denied plaintiff's motion for an extension of time and dismissed the plaintiff's claims against the individual defendants. Plaintiff later moved for reconsideration of this order and that motion was denied on December 6, 1984. Plaintiff filed the instant affidavit on January 7, 1985.

Upon considering plaintiff's affidavit, the court is faced with the immediate problem of the lack of a certificate of counsel. It has been held that the lack of a certificate of counsel is sufficient ground for overruling a motion to disqualify since the certificate requirement is founded on the assumption counsel of integrity will not execute such a certificate in reckless disregard of the truth; hence the requirement is intended to protect against an obviously untruthful affidavit or an unjustified attempt by a party to disqualify the judge. *Morrison*

v. United States, 432 F.2d 1227 (5th Cir. 1970), *cert. denied*, 401 U.S. 945 (1971). Counsel are charged with an affirmative duty to undertake considerable deliberation and investigation as to whether the allegation in the affidavit are true, and cannot rest upon the mere word of his client. *United States v. Hanrahan*, 248 F.Supp. 471 (D.D.C. 1965). He must believe the facts alleged to be accurate and correct. *Duplan Corp. v. Deering Milliken, Inc.*, 400 F.Supp. 497 (D.S.C. 1975). In the present case plaintiff can of necessity furnish no certification of counsel, for she has no counsel at this time. Thus, the court believes that the lack of a certificate of counsel is sufficient to deny this motion. However, I do find an additional reason to deny the motion.

When a party has filed an affidavit alleging personal bias or prejudice on the part of a judge before whom a matter is pending, that judge has the obligation to determine if the affidavit is timely and sufficient. *Berger v. United States*, 255 U.S. 22 (1921); *United States v. Gigax*, 605 F.2d 507 (10th Cir. 1979). The affidavit is to be strictly construed against the party seeking disqualification. *Beland v. United States*, 117 F.2d 958 (5th Cir. 1941), *cert. denied*, 313 U.S. 585 (1940); *United States v. Cerrella*, 529 F.Supp. 1373 (S.D. Fla. 1982).

Section 144 requires that the affidavit of prejudice be "timely." Its specific provision that it be filed not less than ten days before the beginning of the term at which the proceeding is to be heard is no longer applicable since terms of court were abolished in 1963. *Andrews, Mosburg, Davis, Elam, Legg & Bixler, Inc. v. General Insurance Co.*, 418 F.Supp. 304 (W.D. Okla. 1976). The affidavit must now be filed with reasonable diligence. *United States v. Kelly*, 519 F.Supp. 1029 (D. Mass. 1981). Although plaintiff's affidavit was filed a month after this court's ruling on December 6, 1984, the court considers the affidavit timely filed.

An affidavit of prejudice, to be sufficient, "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger v. United States, supra* at 33-34.

The court must take as true the facts set out in the affidavit. *Bell v. Chandler,* 569 F.2d 556 (10th Cir. 1978). However, the court need not accept the conclusions made by the affiant. *United States v. Bennett,* 539 F.2d 45 (10th Cir. 1976), *cert. denied,* 429 U.S. 925 (1976). Bias under § 144 must be personal to the party seeking disqualification as opposed to judicial in nature. *United States v. Bray,* 546 F.2d 851 (10th Cir. 1976). Adverse rulings or mere error by the court do not constitute sufficient basis for disqualification. *United States v. International Business Machines Corp.,* 529 F.Supp. 473 (S.D.N.Y. 1982).

Having carefully reviewed plaintiff's affidavit, I find it is insufficient to require disqualification under § 144. Plaintiff has reached the conclusion based on certain adverse rulings by the court in this case that I am anti-Semitic. The facts stated by plaintiff do not support any such conclusion. They fail to give fair support to the charge that I cannot impartially decide this case. The court has previously explained my order of October 15, 1984 and I do not find the need to do so again. Therefore, the court finds that plaintiff's affidavit which I shall construe as a motion for disqualification under 28 U.S.C. § 144 can be denied on this ground as well as the ground set forth previously in this opinion. Plaintiff's request for a stay of this action shall also be denied.

IT IS THEREFORE ORDERED that plaintiff's affidavit (Doc. #208) which the court has construed as a motion for disqualification under 28 U.S.C. § 144 be hereby denied.

IT IS FURTHER ORDERED that plaintiff's motion for a stay be hereby denied.

IT IS SO ORDERED.

Dated this 12th day of March, 1985, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

APPENDIX D

(March 4, 1986)

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS,
Defendant.

Case No. 82-4291

In the United States District Court
for the District of Kansas

ORDER

This matter is presented before the court upon plaintiff's motion for reconsideration of this court's order of February 18, 1986. Having reviewed this motion, the court finds no reason to reconsider and reverse my order of February 18, 1986. Accordingly, plaintiff's motion for reconsideration shall be denied. In order to clear up any misunderstanding, I will affirmatively state that I am not related to any attorney who has appeared in this case or his/her spouse within the third degree. Finally, plaintiff's renewed motion for a stay shall be denied. This action shall proceed to trial on March 10, 1986.

IT IS SO ORDERED.

Dated this 4th day of March, 1986, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

APPENDIX E

(September 19, 1984)

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS, et al.,
Defendants.

Case No. 82-4291

In the United States District Court
for the District of Kansas

ORDER

This matter is presented before the court upon the individual defendants' motion to dismiss. The court has heard oral argument and is now prepared to rule.

In this motion, the individual defendants contend that this action should be dismissed pursuant to Fed.R.Civ.P. 37(b) for plaintiff's failure to comply with the court's order of March 5, 1984. In that order, Judge Van Bebber granted defendants' motion to compel in part and directed the plaintiff to supply more complete and detailed answers to defendants' interrogatories nos. 1, 2, 3, 5, 9, 10 and 11 on or before March 30, 1984. Defendants contend that five months have elapsed since Judge Van Bebber's order and plaintiff has not submitted any supplemental answers. Plaintiff has responded that certain circumstances, not of her own doing, occurring between March 5, 1984 and August 16, 1984 led to her failure to submit the supplemental answers to the interrogatories. Further, plaintiff

contends that the answers she provided in her deposition during the months of July and August sufficiently answer the interrogatories propounded by the defendants.

Dismissal is an undeniably drastic measure which should not be used indiscriminately. Dismissal under Rule 37 is justified only when the litigant's failure to comply with proper discovery constitutes willfulness, bad faith, or gross negligence. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) *(per curiam)*. After carefully considering the circumstances of this case, the court shall not dismiss this action. However, the court does agree with defendants that the interrogatories remain incomplete and that plaintiff needs to supplement her answers. In spite of the various problems articulated by the plaintiff, the court finds that plaintiff has been given a great deal of time to answer these interrogatories. Therefore, the court shall provide the plaintiff with but ten days to comply with Judge Van Bebber's order of March 5, 1984. Plaintiff shall submit supplemental answers to interrogatories nos. 3, 5, 9, 10 and 11. These answers should be detailed and complete and simply attaching xeroxed pages from the deposition will not suffice. Failure to comply with this order will result in the dismissal of this action against the individual defendants.

The court recognizes that this lawsuit might be a burden to the plaintiff. However, plaintiff must recognize that it is also a burden to the defendants. The court owes an obligation to all litigants, including the defendants, to see that cases are prosecuted diligently and without delay. Plaintiff has initiated this action and she must expect to prosecute it. This prosecution will take place at the court's direction, pursuant to the local rules and the Federal Rules of Civil Procedure, and not at the ultimate convenience of the plaintiff. The court hopes that this order will result in moving this case to its conclusion.

IT IS THEREFORE ORDERED that the individual defendants' motion to dismiss be hereby denied.

IT IS FURTHER ORDERED that plaintiff submit supplemental answers to interrogatories nos. 3, 5, 9, 10 and 11 to the defendants within ten days of the date of this order.

IT IS SO ORDERED.

Dated this 19th day of September, 1984, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge